Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BILLIE A. SHAW,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE ASSESSMENT OF A PENALTY UNDER § 6672 IS A DETERMINATION OF TAX RATHER THAN A COLLECTION ACTIVITY FOR PURPOSES OF § 7433?

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE INTERNAL REVENUE SERVICE WRONGFULLY ASSESSED TAX LIABILITY AGAINST THE PETITIONER, BUT DID NOT ENGAGE IN WRONGFUL COLLECTION ACTIVITIES, THEREBY PRECLUDING DAMAGES UNDER 26 U.S.C. §7433 (IMPROPER COLLECTION PRACTICES STATUTES)?

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V.

UNITED STATES OF AMERICA,
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**Petition for a Writ of Certiorari to the
the United States Court of Appeals
For the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Billie A. Shaw petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a - 7a) is reported at 20 F. 3d 182. The decision of the United States District for the Western District of Texas, San Antonio Division (Pet. App.

B, C, 8a - 14a) is an unreported decision.

JURISDICTION

The original judgment of the Fifth Circuit of Appeals was entered May 9, 1994. A timely petition for rehearing was filed which was denied June 7, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and Rule 10.1(c); a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

UNITED STATES STATUTES INVOLVED

1. 26 U.S.C.A. § 7433. Civil damages for certain unauthorized collection activities. (Pet. App. D, 15a - 16a)

2. 26 U.S.C.A § 6671. Rules for application of assessable penalties. (Pet. App. E, 17a)

3. 26 U.S.C.A. §6672. Failure to collect and pay over tax, or attempt to evade or defeat tax. (Pet. App. F, 18a)

STATEMENT

A. Factual Background.

Ms. Shaw was married to Elton E. Shaw in the latter part of 1971. Before the marriage, they entered into a prenuptial agreement and kept their business operations separate. Mr. Shaw owned and operated Southern Aluminum, Inc. and Southern Aluminum Awning, Inc. The name of the corporation was changed from Southern Aluminum, Inc. to Southern Aluminum Awning, Inc. Ms. Shaw had no ownership interest in either corporation, and was never an officer or member of the board of directors of either corporation.

Ms. Shaw was asked to relieve a receptionist on vacation for a period of seven days in the fall of 1988. During that time she first learned of her husband's problems with the Internal Revenue Service. Ms. Shaw did not have access to the corporation's check-

books, nor was she a signatory on its bank accounts. Mr. and Mrs. Shaw maintained separate business bank accounts and personal bank accounts.

Ms. Shaw did not make any decisions regarding the payment of bills for her husband's businesses, was not responsible for preparing payroll checks, and did not prepare payroll tax forms.

Ms. Shaw testified that she first became aware of the IRS problem in the latter part of September, when the bookkeeper asked Ms. Shaw to take a telephone call from Mike Martinez, Collection Agent for the IRS. Mr. Martinez was angry at his inability to reach Mr. Shaw and appeared in the office a few minutes later. Mr. Martinez was extremely angry and asked why a check wasn't there for him. When Ms. Shaw told Mr. Martinez she knew nothing about a check for the IRS, Mr. Martinez did not believe her and was very aggressive, angry and rude to Ms. Shaw, the bookkeeper and customers.

Mr. Martinez called Ms. Shaw after leaving the office. He insisted on payment by 5:00 that day. When Ms. Shaw indicated that the IRS had confiscated the company's funds in the bank and that Mr. Shaw had not left a check, Mr. Martinez asked Ms. Shaw to issue her personal check; otherwise, he intended to put Mr. Shaw in jail if the check was not received by 5:00 p.m. At the insistence of Mr. Martinez, Ms. Shaw wrote a check on her personal separate account, placing thereon a reference number as Mr. Martinez instructed her to do. Upon receiving Ms. Shaw's personal check, Mr. Martinez assessed the 100-percent penalty the corporations owed against Ms. Shaw.

Upon receipt of notice, sent November 10, 1988, that the IRS was going to hold Ms. Shaw responsible for the taxes, Ms. Shaw called Mr. Martinez as instructed in the letter. Mr. Martinez told her there was nothing she could do. Ms. Shaw then hired a tax attorney and protested the assessment of the taxes. Ms. Shaw and her representative also met with Mr. Martinez on December 2, 1988, presenting to him an affidavit and documentation of her non-involvement in the corporations. Mr. Martinez refused to review the documentation, and the 100-percent penalty was assessed against Ms. Shaw

December 12, 1988.

Ms. Shaw subsequently retained the services of a tax expert named David McClelland. Dan Gonzalez, the revenue officer who took over the case after Mr. Martinez was transferred, told Mr. McClelland that Mr. Martinez would abate the tax, and that it was not necessary to file an appeal.

Ms. Shaw had placed her personal residence on the market for sale. She received a call from her real estate agent advising that Ms. Shaw's home was going to be auctioned by the IRS at 9:00 the next morning. Ms. Shaw testified she had not received notice of the sale.

Ms. Shaw also testified that IRS employees intentionally humiliated her by placing five notices of the sale on the front of her house and sending notices to her neighbors. In contrast, when the IRS sold Mr. Shaw's business assets, the IRS placed only one notice on the building, which was considerably larger than Ms. Shaw's home.

Mr. Martinez continued to harass Ms. Shaw to the point that she told him if his conduct continued, she would contact the police. Mr. Martinez laughed at Ms. Shaw and told her no authority could touch his badge. Ms. Shaw further testified that Mr. Martinez intended to and did intimidate her. Ms. Shaw and her representative filed a Report of Interview and a written protest on December 2, 1988 with the Internal Revenue Service.

Ms. Shaw also testified that she was required to file Chapter 11 bankruptcy proceedings, and further testified as to the expenses incurred in hiring a tax attorney, a tax expert, and her bankruptcy attorney. Ms. Shaw indicated that Mr. Martinez had a personal vendetta against her.

Ms. Shaw then testified as to the damages which she suffered as a result of the action of Mr. Martinez and the seizure and sale of her home. Generally she testified that her equity in the home on Mt. Riga at the time of the tax sale was approximately $60,000.00; that she had a sale pending on her West Avenue property which would have brought her a profit of approximately $400,000.00; and that

her financial net worth prior to the time the IRS sold her home at tax sale was approximately $3,700,000.00.

In 1990, Ms. Shaw spoke with Ms. Willie Livingston, another collection agent for the IRS. Ms. Shaw took to Ms. Livingston the documents which she had previously presented to Mr. Martinez. Ms. Livingston went to the computer to pull up Ms. Shaw's records, made copies of Ms. Shaw's documents, and upon her return, advised Ms. Shaw that she would have her supervisor abate the charges against Ms. Shaw, and further advised her to call back in two weeks. At that time, Ms. Livingston advised Ms. Shaw that the charges had been abated and that she would receive a refund of the money Ms. Shaw paid to redeem her home.

Because Ms. Shaw did not receive the promised refund, she was required to file a Claim for Refund, and subsequently filed her Complaint seeking damages for refund and unauthorized collection practices on April 14, 1991 pursuant to 26 U.S.C. § 7433. After the suit was filed, Ms. Shaw received a check in the amount of $5,640.31.

B. Proceedings Below

1. District Court Proceedings.

The case was tried before the Honorable Walter S. Smith, Jr., United States District Judge. At the conclusion of the trial, Judge Smith stated: "It will be the Court's determination Mr. Martinez did disregard Sections 6671 and 6672, which requires and (sic) assessment only to be made against a responsible person. He made no reasonable effort to determine that this lady was a responsible person under the statutes. He disregarded the requirement that that's the only person the assessment could be made against." After taking the case under advisement to determine whether administrative remedies had been followed, Judge Smith issued his Findings of Fact and Conclusions of Law in which he concluded that Ms. Shaw failed to avail herself of the available appellate remedies through the IRS. Judgment for the Defendant was granted April 23, 1993.

2. The Court of Appeals Decision.

Billie A. Shaw give notice of appeal and appealed to the Fifth Circuit Court of Appeals which held that (1) Plaintiff did not fail to exhaust her administrative remedies; however (2) although the IRS improperly assessed tax liability against Ms. Shaw, it did not engage in improper collection procedures, and thus, Ms. Shaw could not seek damages under the improper collection practices statute.

REASONS FOR GRANTING THE PETITION

This Court should allow this writ to issue because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

The decision of the Court of Appeals is in conflict with *Crowd Management Services, Inc. v. U.S.*, 792 F. Supp. 87 (D. Or. 1992), the only case in which the question of whether an assessment of a penalty under § 6672 is a collection action for purposes of § 7433 rather than a determination of tax has been discussed. In *Crowd Management*, a corporate taxpayer and its principal were seeking a refund of payments made to the IRS for assessments and penalties, and the individual plaintiff brought suit for damages pursuant to § 7432 and § 7433. Plaintiff claimed the IRS violated § 6672 by failing to investigate the "willfulness" requirement necessary for the imposition of the 100-percent penalty against him. Quoting from *Crowd Management*:

"To decide this issue, I must first determine whether the assessment of a penalty under § 6672 is a collection activity for purposes of § 7433 rather than a determination of tax. While this issue has not been addressed by any court, I find that a § 6672 penalty assessment is a collection action. Indeed, the only purpose of a § 6672 penalty assessment is to collect a tax from the person responsible for collecting, accounting for and paying over that tax." *Crowd Management*, at 92.

The trial court found that Mr. Martinez had no information to justify his finding that Ms. Shaw was a responsible person, and there-

fore completely disregarded § 6672's requirements. Therefore, the assessment of the 100-percent penalty against Ms. Shaw on December 12, 1988, was a collection action for the purposes of § 7433 for which Ms. Shaw is entitled to damages.

The Court of Appeals relies upon the earlier case of *Miller v. United States of America*, 763 F. Supp. 1534 (N.D. Cal. 1991) as authority for its holding that Ms. Shaw cannot seek damages under § 7433 for an improper assessment of taxes. The Miller case involved a suit by the taxpayer against the Government seeking damages for failure to release a lien and for unauthorized collection actions. The Government argued that the making of an assessment is not a collection activity because an assessment is a mere determination of tax liability which must precede collection actions by the IRS. The Court agreed that a mere assessment is not a collection activity. However, as the Government acknowledged in the *Miller* case, a notice and demand for payment constitutes a collection activity, as does the filing of a notice of tax lien. *Miller*, at 1543.

Activity by the IRS in the *Miller* case which qualified as collection activity included, among others, assessments incorporating demands for payment and the filing of a notice of tax lien. The IRS was vigorously attempting to collect a tax deficiency during the period Mr. Miller was in contact with the IRS. The Court therefore found that there was a genuine material issue of fact as to whether an IRS agent involved in the collection of Mr. Miller's tax deficiency "recklessly or intentionally" disregarded <u>any</u> provision of the tax code, and denied the Government's motion for summary judgment on Mr. Miller's causes of action under 26 U.S.C. § 7432 and § 7433.

In the Shaw case, the District Court determined that Mr. Martinez completely disregarded Sections 6671 and 6672 of the tax code.

The Court of Appeals contends that Ms. Shaw cannot seek damages under § 7433 for an improper assessment of taxes. However, in footnote number four, the Court discusses Ms. Shaw's complaint of <u>collection</u> activities which occurred in October 1988 and states "because those <u>collection</u> activities occurred in October 1988, that

conduct cannot form the basis of a § 7433 claim.

Ms. Shaw certainly did complain about the conduct of Mr. Martinez in using threats to coerce the October 10, 1988 payment from Ms. Shaw, which was apparently the sole basis upon which the 100-percent penalty was assessed against Ms. Shaw. However, Ms. Shaw also testified that Mr. Martinez' activities did not stop with the extortion of the October 10, 1988 payment.

According to the brief of the Government, the 100-percent penalty was not actually assessed against Ms. Shaw until December 12, 1988. Not only did the IRS begin collection activities before the assessment of the 100-percent penalty against Ms. Shaw, they continued through April 6, 1989, the date Ms. Shaw's residence, which constituted her separate property, was sold at public auction.

According to the testimony of Ms. Shaw, Mr. Martinez continued to harass her, refused to consider the documentation presented to him on December 2, 1988, posted notices on her home with the intention of humiliating her and bragged that no authority could touch his badge. Mr. Martinez not only recklessly and intentionally disregarded numerous provisions of the Internal Revenue Code, he believed himself to be above the law.

Ms. Shaw timely filed a protest letter. However, the IRS continued to disregard its rules and regulations as contained in Section 5635.1 and Section 5635.2(5) of the Internal Revenue Manual. Section 5635.1 requires that a person against whom a 100-percent penalty has been proposed should be informed that they will have an opportunity to protest and appeal the penalty through the IRS Appeals function. Upon receipt of the notices of proposed assessment, which were sent November 10, 1988, Ms. Shaw contacted Mr. Martinez within ten days as instructed by the notices. Mr. Martinez did not inform Ms. Shaw of her opportunity to protest and appeal--to the contrary, he told her there was nothing she could do.

Ms. Shaw then filed a protest letter which the IRS contended was insufficient. The IRS again intentionally and recklessly disregard

its own rules and regulations. Section 5635.2(5) of the Internal Revenue Manual requires the IRS to inform the taxpayer of the required information, if the protest letter is insufficient, and to provide 30 days in which to perfect the appeal. Ms. Shaw's protest letter was dated December 2, 1988 and delivered to Mr. Martinez on December 2, 1988, along with Ms. Shaw's Form 4180, Report of Interview with Persons Relative to Recommendation of 100-percent Penalty Assessments. Again, Mr. Martinez refused to consider the documents and the 100-percent penalty assessment against Ms. Shaw was made December 12, 1988.

In *State of Florida v. U. S.*, 90-1 USTC ¶ 50,178, Plaintiffs were awarded damages under § 7433 for unauthorized collection practices. The Court determined that while the IRS was correct that there were procedural problems associated with the case, those problems would have been avoided had the IRS followed its own rules and regulations. Had the IRS followed its own rules and regulations in this case, the improper assessment and subsequent seizure and sale of her home, and the resulting financial ruin, would have been avoided.

The unauthorized collection activities continued with the issuance of a Levy signed by Mike Martinez, dated January 4, 1989, the seizure of Ms. Shaw's home on January 6, 1989, the report of which was signed by Mike Martinez, and the sale of her home at public auction on April 6, 1989. Mr. Gonzalez testified that Exhibit 4, the "Levy" signed by Mr. Martinez, is the Notice of Levy sent to Ms. Shaw on January 4, 1989. All of these activities constitute "collection" activities under the *Miller* case. *Miller*, at 1543. Additionally, as stated in *Crowd Management*, the assessment of a penalty under § 6672 is a collection activity for purposes of § 7433 rather than a determination of tax. *Crowd Management*, at 92.

Although the tax assessments against Ms. Shaw were abated in September 24, 1990, the tax lien has to this date not been released, and the money which Ms. Shaw paid to redeem her personal residence was not refunded to her until May 2, 1991, after the claim for refund was made and this suit filed.

For the Court of Appeals to conclude that although the assessment was improper, the collection activities were proper, and to deny Ms. Shaw a claim under § 7433 for damages suffered is absolutely illogical. The conduct of the IRS in assessing the 100-percent penalty against Ms. Shaw, filing a tax lien, issuing a notice of tax lien, and seizing and selling her home at public auction, is the very conduct which the Legislature intended to protect taxpayers against when § 7433 was added to the Internal Revenue Code in 1988 as a part of the "Taxpayers Bill of Rights". The intent of the Legislature in adding § 7433 to the Internal Revenue Code was to give taxpayers such as Ms. Shaw a remedy for damages sustained as a result of unreasonable actions taken by an IRS employee.

In a case very similar to the Shaw case, *Miklautsch v. Gibbs*, 90-2 USTC ¶ 50,587, the IRS contended that because § 7433 authorizes suits only for wrongful conduct in connection with the "collection" of a tax, § 7433 is inapplicable where the IRS employs procedurally correct collection methods to collect on a tax which was wrongfully assessed; i.e., an assessment was made in intentional or reckless disregard of the tax code. The Court stated:

"This interpretation would clearly thwart Congress's intent in passing section 7433. Under the IRS's view, the IRS could arbitrarily--and without any justification whatsoever--assess a tax, and then collect on that tax with impunity so long as procedurally proper methods were employed. It was the intent of Congress to protect taxpayers, not to allow the IRS to wrongfully bring a person to financial ruin so long as its collection methods were procedurally correct.

"The IRS's argument is also contrary to the plain meaning of section 7433. The statute is not limited only to acts in disregard of proper collection procedures. Rather, the statute refers to <u>any act in disregard of any provision</u> in the tax code, which is in connection with the <u>eventual</u> 'collection' of a tax.

"Under a proper interpretation of section 7433, where a tax has been wrongfully assessed, and the IRS goes ahead and enforces collection on that tax, an action shall lie. It is true Congress chose not to extend section 7433 to damages arising from the wrongful deter-

mination of a tax alone. Yet, all this means is that where a tax is wrongfully assessed but the taxpayer voluntarily remits payment, there is no action for damages because there has been no enforced collection. The distinction between enforced collection and voluntary payment is sensible in that a taxpayer who has voluntarily paid is not likely to suffer the severe damage that occurs when the IRS brings its full collection powers to bear. Moreover, a taxpayer who voluntarily makes payments usually does so in cash which can easily be recouped by way of a refund. When the IRS collects an outstanding tax, it does so by seizures and levies on property, creating losses that (as this case demonstrates) cannot be recovered in an ordinary refund action."

This Plaintiff asked the question of the Court of Appeals and she asks it again of this Court: If she is not liable for the tax, how can any effort to collect such tax against her not be a violation of her taxpayer rights?

The conduct of the IRS with regard to Ms. Shaw was not only reckless and intentional, it was unconscionable. An IRS collection agent, frustrated in his attempts to collect the tax from the corporation and the "responsible person", intimidated, threatened and coerced Ms. Shaw into giving him a check on her personal account, instructing her to place thereon the tax identification number of one of the corporations. Using that check as the sole basis for determining that Ms. Shaw was responsible, Mr. Martinez assessed the 100-percent penalty against her. There was absolutely no evidence produced by the IRS at the trial that Ms. Shaw had any connection with either corporation during the tax periods (periods ending 9-30-87 and 6-30-88) for which the penalty was assessed.

As the Court in *Beaty v. U.S.*, 91-2 USTC ¶ 60,077 held, the time for the IRS to think though its legal position was before it took enforcement against Plaintiff's property. Had Mr. Martinez followed the Code, and the IRS thought through its legal position before it took enforcement against a person against whom a tax was not due, Ms. Shaw would not have been damaged.

In *Hearne v. U.S.*, 93-1 USTC ¶ 50,344, the taxpayers' claim for

damages under § 7433 was dismissed for failure to exhaust administrative remedies. However, the Court made the following observations: The IRS's conduct was repugnant and unacceptable behavior from a US governmental agency. It is clear beyond doubt the IRS and its personnel acted unprofessionally towards the Hearnes who were, and are, American taxpayers--good taxpayers, too. The Hearnes, and all taxpayers, deserve better treatment than the Hearnes received.

Ms. Shaw was and is an American taxpayer -- a good taxpayer. Ms. Shaw certainly deserved better treatment than she received, and should receive compensation for the damages suffered as a result of the IRS's illegal actions.

The Court of Appeals erred in holding that the assessment of the 100-percent penalty against Ms. Shaw was not a collection activity for purposes of § 7433 and that the collection efforts the IRS pursued were not illegal.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 25, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 93-8405

Billie A. SHAW, *Plaintiff-Appellant*,

v.

UNITED STATES of America, *Defendant-Appellee*.

Appeals from the United States District Court
for the Western District of Texas

May 9, 1994

Taxpayer filed suit against government for damages alleging that Internal Revenue Service (IRS) wrongfully assessed tax penalties against her for tax liabilities of her husband's corporation. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., entered judgment in favor of government on grounds that taxpayer failed to exhaust her administrative remedies. Taxpayer appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) taxpayer did not fail to exhaust administrative remedies, however, (2) although IRS improperly assessed tax liability against taxpayer, it did not engage in improper collection procedures, and thus taxpayer could not seek damages under improper collection practices statute.

Affirmed.

1. Administrative Law and Procedure 229
Internal Revenue 4464

In civil action against government for damages due to alleged intentional or reckless disregard of statute or regulation in connection with collection of federal taxes, taxpayer did not fail to exhaust administrative remedies, where taxpayer filed action prior to enactment of regulation establishing administrative procedures to exhaust before filing such claim; taxpayer's claim of improper assessment, for which she allegedly failed to exhaust administrative remedies, was separate claim from improper collection practices claim, each claim with its own administrative remedies to exhaust. 26 U.S.C.A. § 7433(d)(1).

2. Internal Revenue 4464

Although Internal Revenue Service (IRS) improperly assessed tax liability against taxpayer, it did not engage in improper collection procedures, and thus taxpayer could not seek damages under improper collection practices statute. 26 U.S.C.A. § 7433.

3. Internal Revenue 4464

Under statute providing for civil action against government for damages due to alleged intentional or reckless disregard of statute or regulation in connection with collection of federal taxes, taxpayer cannot seek damages for improper assessment of taxes. 26 U.S.C.A. § 7433.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY and JOLLY, Circuit Judges, and PARKER[1], District Judge.

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[1]Chief Judge of the Eastern District of Texas, sitting by designation.

E. GRADY JOLLY, Circuit Judge:

This taxpayer and appellant, who filed suit against the government under 26 U.S.C. § 7433 (1989),[2] argues that the district court erred in concluding that she failed to exhaust her administrative remedies, thus barring her claim. Although we find that the taxpayer exhausted her administrative remedies, we affirm the district court's judgment because the taxpayer has failed to demonstrate that the IRS engaged in conduct that is actionable under 26 U.S.C. §7433 (1989).

I.

On November 10, 1988, the Internal Revenue Service wrongfully assessed a penalty against Mrs. Billie A. Shaw for her failure to pay taxes owed by her husband's separately owned company. The IRS notified Mrs. Shaw of the assessment, detailing the amount of the assessment as well as the procedures Mrs. Shaw should follow if she wished to contest the assessment. Mrs. Shaw hired an attorney to assist her in contesting the wrongful assessment. Although several letters were sent and several inquiries were made, Mrs. Shaw and her attorney failed to follow the formal appeal procedure outlined in the IRS notice. Because Mrs. Shaw failed to properly contest the assessment, the IRS prepared a levy against her private residence, eventually sold the property at auction, and thus partially satisfied the tax liability assessed against her. Mrs. Shaw later repurchased the property from the buyer. She then filed a notice of claim with the IRS, seeking a refund of the amount she had paid to repurchase her home as well as an abatement of further tax liability. Eventually the IRS recognized that the original tax assessment was improper, and

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[2]Section 7433 provides in pertinent part that [i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.
26 U.S.C. § 7433 (1989).

Mrs. Shaw received a refund of all money collected and the remaining tax liability was abated. However, as a result of her problems with the IRS, Mrs. Shaw's credit rating was adversely affected, and she was unable to obtain extension of credit needed to pay off loans on other parcels of property.

On April 16, 1991, Mrs. Shaw sued the United States for damages under 26 U.S.C. § 7433, alleging that the IRS wrongfully assessed tax penalties against her for the tax liabilities of her husband's corporation. After a bench trial, the district court held that although the IRS agent who initially assessed the penalty disregarded 26 U.S.C. § 6672,[3] Mrs. Shaw was not entitled to recover damages because she failed to exhaust her administrative remedies. Mrs. Shaw appeals this judgment.

II.

A

[1] On appeal, Mrs. Shaw contends that the district court erred in concluding that she failed to exhaust her administrative remedies. Title 26 U.S.C. § 7433 was enacted to allow a taxpayer to sue the United States if the IRS intentionally or recklessly disregards a statute or regulation in connection with collection of federal taxes. *Gonsalves v. IRS*, 975 F.2d 13, 16 (1st Cir. 1992). However, § 7433 specifically states that "[a] judgment for damages shall not be awarded under [this section] unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." 26 U.S.C. § 7433(d)(1) (1989). Title 26 C.F.R.

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[3]Section 6672 provided in pertinent part that [a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.
26 U.S.C. § 6672(a) (Supp.1994).

301.7433-1(e) sets forth the specific administrative procedures a taxpayer must follow to take advantage of a § 7433 claim. This regulation, however, applies only to those civil actions filed after January 30, 1992. Prior to the enactment of § 301.7433-1, there were no administrative procedures to exhaust before filing suit on a § 7433 claim in federal court. *Information Resources v. United States*, 950 F.2d 1122, 1128 (5th Cir. 1992). In this case, because Mrs. Shaw filed her civil action before January 30, 1992, she was not required to exhaust any administrative remedies connected to § 7433.

Although the government concedes that there were no administrative remedies to exhaust with respect to § 7433, the government argues that Mrs. Shaw's supposed failure[4] to exhaust the remedies associated with the improper assessment claim bars this § 7433 suit for improper collection practices. After consideration, we conclude that the two claims are separate, each having its own administrative remedies to exhaust. First, each claim is based on different conduct--improper assessment deals with the decision to impose tax liability while improper collection activities involves conduct of an agent trying to collect the taxes owed. *Miller v. United States*, 763 F.Supp. 1534, 1543 (N.D.Cal. 1991). To demonstrate a violation of each claim involves proof of distinctive facts--to prove a claim for improper assessment, a taxpayer must demonstrate why no taxes are owed, but to prove a claim for improper collection practices, the taxpayer must demonstrate that the IRS did not follow the prescribed methods of acquiring assets. Moreover, it is possible to have an improper collection practices claim without a corresponding improper assessment claim, and vice versa. It is also possible, as this case

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[4]It is questionable whether the government can reasonably argue that Mrs. Shaw failed to exhaust her remedies for the improper assessment claim. Although Mrs. Shaw failed to properly take full advantage of every step of the formal appeal process, she was ultimately successful in her effort to obtain a refund and an abatement of the remaining liability. Thus, as far as the improper assessment of taxes is concerned, it appears that Mrs. Shaw did exhaust her administrative remedies.

illustrates, that a taxpayer could have a colorable claim for both an improper assessment of taxes as well as improper collection practices. The fact that these separate claims can develop with re- spect to the same taxpayer does not affect the separate and distinctive nature of each claim.

B

[2,3] The government argues that if we find that Mrs. Shaw is not barred procedurally from asserting her § 7433 claim, the district court erred in concluding that the conduct of the IRS agent was actionable under § 7433. Section 7433—by its specific words—allows a taxpayer to sue the government only if, "in connection with *collection* of Federal Tax with respect to a taxpayer, any officer or employee of the [IRS] recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title...." 26 U.S.C. § 7433(a) (1989). The plain language of the statute is well supported by the statute's legislative history. Although in its early form the statute granted taxpayers the right to sue "for damages in connection with the *determination or collection* of any Federal tax," H.R.Conf.Rep. No. 100-1104, 100th Cong., 2d Sess. 228 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4515, 5288 (emphasis added), Congress later deleted that portion of the statute that referred to determination of taxes. As the Conference Agreement states, § 7433 "is limited to reckless or intentional disregard in connection with the *collection* of taxes. An Action under this provision may not be based on alleged reckless or intentional disregard in connection with the *determination* of tax." H.R.Conf.Rep. No. 100-1104, 100th Cong., 2d Sess. 229 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4515, 5289 (emphasis added). Therefore, based upon the plain language of the statute, which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under § 7433 for an improper assessment of taxes. *See also Miller v. United States*, 763 F.Supp. at 1543 (noting the difference between an assessment activity and a collection activity). In this case, although the IRS improperly assessed tax liability against Mrs.

Shaw, it did not engage in improper collection procedures.[5] Thus, Mrs. Shaw cannot collect damages under § 7433.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[5]In her brief, Mrs. Shaw complained of collection activities of an IRS agent that occurred in October 1988. Section 7433 was enacted as part of the Technical & Miscellaneous Revenue Act of 1988 ("TAMRA"), Pub.L. No. 100-647, 102 Stat. 3342 (November 10, 1988), and it applies only "to actions by officers or employees of the Internal Revenue Service after the date of the enactment of this Act." See Pub.L. No. 100-647 § 6241(d) (emphasis added). Thus, only conduct that occurred after the enactment date of TAMRA, November 10, 1988, can serve as a basis for civil damages. Because those collection activities occurred in October 1988, that conduct cannot form the basis of a § 7433 claim.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BILLIE A. SHAW,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. SA-91-CA-0364

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law previously entered in this case, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing in her suit against Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action be borne by Plaintiff.

Any further relief not specifically granted in this Judgment is hereby DENIED.

SIGNED this 26th day of April, 1993.

S/
WALTER S. SMITH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BILLIE A. SHAW,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. SA-91-CA-0364

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on for trial before the Court on April 23, 1993. The evidence presented and the testimony of witnesses supports the following findings of fact:

1. Plaintiff Billie A. Shaw ("Plaintiff") married Elton E. Shaw ("Mr. Shaw") in 1971. Pursuant to a pre-nuptial agreement, any property they owned before and after marriage would remain separate property. During their marriage, they did not co-mingle their separately owned businesses or their bank accounts.

2. Mr. Shaw owned and operated a metal construction company by the name of Southern Aluminum, Inc. ("Southern Aluminum"), which was later changed to Southern Aluminum Awning, Inc. ("Southern Awning").

3. The Corporations failed to deduct payroll taxes as required by law, and assessments were leveled against both companies and Mr. Shaw by the Internal Revenue Service ("IRS"). Eventually, the stock of the corporations was sold to satisfy the tax liability.

4. Due to a personnel shortage, Plaintiff filled in at her husband's office as a receptionist beginning in the fall of 1988. Because the bookkeeper quit and the receptionist never returned, Plaintiff kept working at the business for several months. Her responsibilities were limited to greeting customers, answering the phone, and typing and filing. Plaintiff had no responsibility or authority to pay the company's bills or salaries, nor did she have the authority to sign checks on the company account. Finally, Plaintiff was never a shareholder, officer or director of either corporation. (However, Plaintiff's Exhibit 1, a report of interview signed by Plaintiff and her attorney, indicates that Plaintiff had also worked as a part-time salesperson and that she had worked for the company from March 21, 1988 through August 18, 1988.)

5. During her first week, Plaintiff learned that her husband's business was experiencing tax problems. Mike Martinez ("Martinez"), a revenue agent with the IRS, telephoned the office to inquire about a check that Mr. Shaw was supposed to have ready to satisfy part of his tax liability. When Plaintiff explained she had no knowledge of such a circumstance, Martinez became angry and rude.

6. Several times during the next few days, Martinez came to the office demanding payment and disrupting operations. Martinez was rude to Plaintiff, as well as to the other employees and customers.

7. On October 10, 1988, Martinez threatened to have Mr. Shaw placed in jail if a check for the corporations' tax liability was not forthcoming. In order to prevent such an unfortunate occurrence, Plaintiff wrote a check for $200 to the IRS from her personal account. The reference number on the check was supplied by Martinez. (However, Plaintiff's Exhibit 1 again contradicts Plaintiff's testimony in that the exhibit indicates that the $200 was paid out of Plaintiff's funds at the direction of her husband.)

8. Part of the corporate stock was bought by Storms Specialties and Services, which was owned by Doris Storms and her daughter Bessie Smith.

9. On October 18, 1988, an additional check for $200 was issued to the IRS to satisfy a portion of the corporations' tax liability. The check was payable from the account of Storms Specialties & Services, and was co-signed by Plaintiff and D.O. Storms. The IRS reference number contained on Plaintiff's personal check was also included on the Storms check.

10. Subsequently, Plaintiff received notice that the IRS was assessing the corporations' tax liabilities against her, based upon the assertion that the corporations' funds were intermingled with her own. The IRS based this assumption upon the issuance of a check from her personal account and the issuance of the Storms check.

11. Plaintiff received a proposed assessment of 100 percent penalty for both Southern Aluminum and Southern Awning. The proposed penalty for Southern Awning was $17,293.92, while proposed penalty for Southern Aluminum was $63,652.68. While Plaintiff disclaimed knowledge of the individual who signed the certified mail return receipt card, she testified that she telephoned Martinez the same day she received the notice. Further, although the assessment for Southern Aluminum was returned unclaimed, it was mailed to the exact same address, and Plaintiff testified that she threw many IRS letters away without reading them. The failure to receive notice of the Southern Aluminum assessment, therefore, was due to Plaintiff's own actions.

12. The notices of proposed assessment included specific instructions for Plaintiff to follow should she desire to contest the assessment. She was informed that she should contact Mike Martinez within ten days from the date of the letter is she did not agree with the assessment and had additional information to support her claims.

13. The notice further provided that any decision could be appealed to the office of the Regional Director of Appeals. Such an appeal was to be addressed to the District Director, to the attention of the Group Manager at the address indicated on the front of the notice letter. Plaintiff, however, failed to request an appeal through this procedure.

14. Plaintiff contacted Martinez the same day she received the notices--November 16, 1988. Martinez told her that, as far as he was concerned, there was nothing she could do but pay the assessed penalty.

15. Plaintiff hired an attorney, J. Kirby Thomas ("Thomas") (who is now deceased), to handle the matter for her.

16. Thomas wrote a letter to Martinez disputing the validity of the proposed penalty for Southern Awning. The letter did not contest the validity of the proposed penalty for Southern Aluminum.

17. On some unspecified date, Plaintiff indicates that she and her attorney also had a personal interview with Martinez, during which she presented Martinez with a number of letters from former corporation employees. These letters indicated that Plaintiff did not occupy a position of authority with the corporations. Martinez failed to review these documents at that time.

18. At some point, Thomas became ill and Plaintiff hired another attorney who was supposedly a tax expert. The evidence was unclear as to which attorney attended the conference with Plaintiff and Martinez. However, neither the new attorney, nor Thomas, appealed Martinez' decision regarding the proposed assessment.

19. Martinez then prepared a levy against Plaintiff's private residence, which was approved by Linda Patillo, Martinez' group manager, and Jeffrey Basall, the next level manager.

20. Plaintiff did not appeal the lien being placed against her property.

21. Plaintiff's home was posted for auction, but Plaintiff never received notice from the IRS. She learned of the proposed sale from her real estate agent, who had been negotiating to sale the house. However, Plaintiff also testified that many of the notices and letters she received from the IRS she threw away unopened.

22. Besides being advertised in the local newspapers, notice of

the pending auction was sent to all of Plaintiff's neighbors.

23. Plaintiff did not attempt to halt the foreclosure.

24. The house was sold to Constance H. McClintick for $4,594.94. Plaintiff later repurchased the property for $4,715.80.

25. As a result of the lien and foreclosure, Plaintiff's credit rating was negatively affected. She failed to obtain extensions of credit needed to pay-off loans on other pieces of property.

26. Plaintiff subsequently filed for Chapter 11 bankruptcy, but the proceeding was dismissed.

27. Plaintiff next filed a notice of claim with the IRS, seeking a refund of the amounts she had paid and an abatement of further tax liability.

28. Willie Livingston ("Livingston"), another revenue agent, was assigned Plaintiff's file. Livingston recommended that the assessment against Plaintiff be abated, and that all moneys collected thus far be refunded. This recommendation was approved by Livingston's supervisor, and Plaintiff received a refund of $5,640.31 on May 2, 1991.

29. Plaintiff asserts that the actions of Martinez constitute a violation of Title 26, United States Code, Section 6672 ("§6672") and that she is, therefore, entitled to recover $100,000 under Title 26, United States Code, Section 7433 ("§7433").

Any finding of fact which should more appropriately be considered a conclusion of law is hereby deemed as such.

The foregoing facts lead to the following conclusions of law:

1. Section 7433 provides that a taxpayer may recover damages against the United States when " any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this

title...."

2. The actions of Mike Martinez indicate a total disregard of §6672. He had no information that would justify a finding that Plaintiff was a "responsible person" for Southern Aluminum or Southern Awning and therefore completely disregarded §6672's requirements.

3. Section 7433 further provides that no judgment for damages may be awarded "unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service."

4. Plaintiff failed to avail herself of the available appellate remedies offered through the Internal Revenue Service, and of which she received notice along with the notices of proposed assessment of 100 percent penalty. Whether this was the result of her own negligence or that of her attorneys, the failure to exhaust those administrative remedies bars the present action.

Any conclusion of law which should more appropriately be considered a finding of fact is hereby deemed as much.

In light of the preceding findings of fact and conclusions of law, it is hereby **ORDERED** that Judgment be entered in favor of the Defendants. It is further

ORDERED that any motions not previously ruled upon by the Court are hereby **DENIED.**

SIGNED this 26th day of April, 1993.

S/
WALTER S. SMITH, JR.
United States District Judge

APPENDIX D

§ 7433. Civil damages for certain unauthorized collection actions

(a) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $100,000 or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority.--Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations.--

(1) Requirement that administrative remedies be exhausted.--A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages.--The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the

plaintiff.

(3) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

APPENDIX E

§ 6671. Rules for application of assessable penalties

(a) Penalty assessed as tax.--The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.--The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

APPENDIX F

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

APPENDIX G

5635
Appeal Rights and Procedures

5635.1
General

(1) Persons against whom a 100-percent penalty has been proposed should be informed that they will have the opportunity to protest and appeal the penalty through the IRS Appeal's function.

5635.2
Appeals Consideration

(5) If the information in the protest letter is insufficient to adequately process the appeal, the responsibility unit will advise the taxpayer of the required information and provide 30 days to perfect the protest. If a properly prepared protest is not received during the 30 day period, the 100-percent penalty will be assessed.